No. 03-388

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DENNIS BATES, *et al.*,
Petitioners,

v.

DOW AGROSCIENCES LLC,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center based in Washington, D.C., with supporters nationwide.[1] While WLF engages in litigation and administrative proceedings in a variety of areas, WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared as *amicus* in this Court and lower courts to address the proper scope of federal preemption. *See, e.g., Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Geier v. American Honda Co.*, 529 U.S. 861 (2000); *Greater N.Y. Metro. Food Council v. Giuliani*, 195 F.3d 100 (2nd Cir. 1999); *Lindsey v. Tacoma-Pierce County Health Dept.*, 195 F.3d 1065 (9th Cir. 1999); *Taylor v. SmithKline Beecham Corp.*, 468 Mich. 1, 658 N.W.2d 127 (Mich. 2003); *Etcheverry v. Tri-Ag Services*, 22 Cal. 4th 316, 993 P.2d 366 (Cal. 2000). WLF has no interest, financial or otherwise, in the outcome of this lawsuit.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the Court with the opportunity to affirm the longstanding interpretation of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et seq.* ("FIFRA"), as preempting state law actions based on alleged mislabeling. FIFRA has been interpreted as preempting all such claims by a virtually unbroken line of federal appeals court and state supreme court decisions over the past twenty years.[2]

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation or submission of this brief. The parties have consented to the filing of all *amicus* briefs; pursuant to Supreme Court Rule 37.3, letters evidencing this consent have been filed with the Clerk.

[2] Respondent's Br. at 26-28; Amicus Br. of Association of Trial Lawyers of America at 1, 10-11.

Congress has never acted to overturn this consistent interpretation. A contrary ruling by this Court would upset the settled expectations of stakeholders, particularly insurers and reinsurers that have implicitly incorporated the rule into the premiums for already-issued liability policies.

As further detailed below, if this Court were to change the current national policy on FIFRA preemption, the effect of such a holding would be to frustrate three important congressional and Executive Branch objectives. First, it would frustrate the congressional intent that enforcement of pesticide labeling standards would be tempered by prosecutorial discretion to assure that enforcement actions are proportionate to the harm and are consonant with the needs of the agricultural sector. Second, it would frustrate the congressional intent embodied in Federal Rule of Evidence 407 in favor of promoting continuous self-improvement measures by industry, including improvements in product labeling. Finally, it would frustrate current Executive Branch policies in favor of harmonizing U.S. pesticide labeling standards with recently-adopted global standards.

ARGUMENT

I. Congress Determined In FIFRA That EPA, and EPA Alone, Would Set Policy As To Pesticide Misbranding Standards And Enforcement

In enacting FIFRA, Congress vested EPA with a panoply of enforcement powers, backed by both civil and criminal penalties. Congress directed EPA to exercise these powers with prosecutorial discretion, taking into account the potential consequences of its actions with regard to a pesticide, including effects on the agricultural economy and retail food prices. The sweeping standard-setting authority granted to the EPA in the area of pesticide labels, and the discretionary character of the enforcement powers created by Congress, reinforces the

preemption provision of 7 U.S.C. § 136v(b):[3] An unrestricted ability of plaintiffs' lawyers to bring label-based actions under state law would plainly undermine the stated intent of Congress with regard to standard-setting and enforcement. It would sweep away both the exclusivity of federal regulation and the policy considerations that Congress expected would drive and restrain enforcement activity.

The congressional intent of *federal* policymaking and *discretionary* enforcement strongly counsels against upsetting the longstanding judicial interpretation of § 136v as preempting state law actions. Indeed, this Court has indicated that even in the absence of an explicit preemption provision in a federal statute, it is "not enough to say that the ultimate goal of both federal and state law" is the same; "state law also is preempted if it interferes with the methods by which the federal statute was designed to reach this goal." *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). A proliferation of state law actions based on alleged labeling violations would interfere with the approach chosen by Congress with regard to FIFRA enforcement.

FIFRA makes it unlawful to sell any "misbranded" pesticide. 7 U.S.C. § 136j(a)(1)(E). The statute sets out a detailed definition of "misbranded" at § 136(q), and EPA has set out even more detailed requirements for pesticide labeling at 40

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[3] Section 136v provides as follows in pertinent part:

> § 136v Authority of States
> (a) In general
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
> (b) Uniformity
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v(a) & (b).

C.F.R. Part 156. In support of these statutory and regulatory requirements, EPA has the authority to forbid the sale or use of any pesticide if it has "reason to believe" the pesticide is in violation. 7 U.S.C. § 136k(a). EPA also has the authority to proceed in federal district court to confiscate any misbranded pesticide, including in cases where the labeling conforms to federal requirements and the pesticide "nevertheless causes unreasonable adverse effects on the environment." 7 U.S.C. § 136k(b)(3).

EPA may cancel the registration of a pesticide where the product "when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment." 7 U.S.C. § 136d(b). Congress specifically directed, however, that the agency take policy considerations into account in weighing whether to seek cancellation. In particular, EPA must seek the advice of the Secretary of Agriculture and must finally "include among those factors to be taken into account the impact of such final action on production and prices of agricultural commodities, retail food prices, and otherwise on the agricultural economy. . . ." *Id.*

EPA may impose substantial civil or criminal penalties for any violation of FIFRA or EPA's regulations under the statute. 7 U.S.C. §§ 136*l*(a) & (b). Pesticide makers are subject to civil penalties of up to $5,000 per offense. Here, too, Congress has directed EPA to exercise discretion. "In determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation." 7 U.S.C. § 1361*l*(a)(4).

Congress further made clear its expectation that EPA will use prosecutorial discretion by stating that "[n]othing in this Act shall be construed as requiring the Administrator to institute proceedings for prosecution of minor violations of this Act whenever the Administrator believes that the public interest will

be adequately served by a suitable written notice of warning." 7 U.S.C. § 136g(c)(3).

Each of these provisions calling for calibrated enforcement would effectively become a dead letter under the theory advanced by Petitioners. The federal program, with its mandate to take into account nationwide agricultural and economic considerations, would take a back seat to claims filed under the varied laws of the states – claims limited not by policy concerns, but by the ability of plaintiffs' lawyers to recruit claimants. As the Supreme Court of Texas recognized in *Delta Air Lines, Inc. v. Black*, 116 S.W.3d 745 (Tex. 2003), where a federal administrative enforcement program is already in place with respect to certain conduct, allowing state law claims to go forward means the affected industry "would potentially be subject to regulation by fifty different states" and "could create extensive multi-state litigation launching inconsistent assaults on federal deregulation. . . ." *Id.* at 756.

II. The Public Policy In Favor of Preemption of State Law Claims Based on Labeling Is Particularly Strong Where, As Here, The Claim Is Based On Subsequent Label Improvements.

Federal Rule of Evidence 407 is meant to avoid the scenario in which businesses fear taking measures to improve the quality and safety of their products out of concern for tort liability. By excluding evidence in federal cases based on corrective measures or product improvements, Rule 407 embodies a federal policy that fostering higher quality and safety should take precedence over assuring a civil remedy in some cases. Where, as here, a labeling claim is based on exactly such a corrective measure, Pet. App. 30a, FIFRA's preemption provision should be read in light of the policy in Rule 407.

Rule 407, "Subsequent Remedial Measures," provides as follows:

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The rule codifies the "conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault." Notes of Advisory Committee Rules. When a manufacturer takes action to improve a product, whether it be changes to the product, changes in policy, or changes to warning labels, such action cannot be introduced as evidence to prove negligence or culpability for damages resulting from use of that product prior to the action. As the Seventh Circuit has noted, "The major purpose of Rule 407 is to promote safety by removing the disincentive to make repairs (or take other safety measures) after an accident that would exist if the accident victim could use those measures as evidence of the defendant's liability." *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 467 (7th Cir. 1984). *See also Raymond v. Raymond Corp.*, 938 F. 2d 1518, 1523 (1st Cir. 1991).

Rule 407 applies of its own force, naturally, in federal court actions (though its independent application to the present case is not before this Court). Whether or not Rule 407 applies of its own force in a given case, there is a strong public interest in preventing plaintiffs from using evidence of remedial measures as a sword against manufacturers. The policy that Rule 407 sets out thus favors the long-time interpretation of FIFRA as preempting state law actions.

III. The Public Policy In Favor of Preemption of State Law Claims Based On Labeling Is Particularly Strong Where, As Here, Inconsistent State Standards Would Thwart Federal Policy On Harmonization With Global Labeling Standards.

The Globally Harmonized System of Classification and Labelling of Chemicals ("GHS") is the result of a global effort to harmonize "major existing systems for chemicals in transport and in the workplace, pesticides, and consumer products, without lower the level of protection afforded by those existing systems." *The Globally Harmonized System of Classification and Labelling of Chemicals (GHS): Implementation Issues for the Office of Pesticide Programs* 2 (Draft July 7, 2004) (hereinafter *GHS Implementation Issues*).[4] United States Government positions in the development and negotiation of GHS – an effort spanning a decade – were determined "by an interagency group consisting of key regulatory and trade agencies and led by the State Department." *Id.* at 4.

EPA has announced its intent to implement GHS. GHS is a voluntary international system; its implementation by EPA is not founded on treaty obligations, but instead on U.S. federal policy considerations. EPA has stated that in its view, global consistency in labeling "will promote greater clarity and understanding of the hazards of pesticide products, thereby reducing potential hazardous exposures and adverse effects from use. . . ." *Pesticides; Implementation of Globally Harmonized System; Notice of Availability*, 69 Fed. Reg. 52,262 (Aug. 25, 2004). EPA also expects that harmonizing U.S. labeling requirements with global standards "will reduce costly and time-consuming activities needed to comply with multiple

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[4] Available for download at *http://www.epa.gov/oppfead1/international/global/globa-whitepaper.pdf*.

international classification and labeling systems, promoting more consistency in regulation, and reducing non-tariff barriers to trade." *Id.* at 52,264. EPA intends to implement GHS with respect to all FIFRA-covered pesticides and to adopt GHS criteria for classifying hazards as well as GHS label elements. *GHS Implementation Issues, supra,* at 12.

National uniformity of pesticide labeling regulation is thus of even greater significance today than it was when FIFRA was enacted in 1972. The United States Government cannot speak with one voice in negotiations over labeling standards if every federal policy – including a policy of embracing a deregulatory approach toward some label content – may be overridden by a jury in a state law action. Conflicting standards in state law actions would thwart the hoped-for benefits of reducing compliance costs from multiple international classification and labeling systems and of reducing non-tariff barriers to trade.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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